Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-646

A/S ARCADIA,

Petitioner,

—against—

GULF INSURANCE COMPANY,

Respondent.

RESPONDENT'S OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent prays that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit be denied.

Opinions Below

The opinion of the Court of Appeals is reported at —— F. 2d ——. The opinion of the District Court is reported at 386 F. Supp. 1081. Both opinions are reprinted in the Petitioner's Appendix at pp. 1A and 21A respectively.

Jurisdiction

The judgment of the District Court was entered on October 23, 1974 (p. 28A). The judgment of the Court of

Appeals was rendered on June 18, 1975. The orders of the Court of Appeals denying rehearing and rehearing in banc were entered on the 5th day of August, 1975.

The jurisdiction in this Court is invoked under 28 U.S.C. Sec. 1254(1) and 28 U.S.C. Sec. 2101(c).

The Petitioner Seeks To Have This Court Frustrate Not Only the Intention of Congress, But the Intent and Purposes of the Shipowners and Stevedores Who Actively Participated in the Formulation of the 1972 Amendments.

It was the intention of Congress that the stevedore, regardless of its negligence, should compensate its injured employee, and in place and stead of indemnity to the negligent shipowner, he would be made to pay increased compensation benefits from the $70.00 rate to the present $315.00 rate, with no ceiling on death claims.

It is more than evident from the history of the 1972 Amendments that it was a compromise between shipowners and stevedores with the interest of longshoremen and employees paramount. See *Lucas* v. *"Brinknes" Schiffahrts Ges.*, 379 F. Supp. 759 (E.D. Pa. 1974), a comprehensive opinion by Judge Huyett for an *ad hoc* panel of three district judges, for some of the colloquy in the Senate Sub-Committee, 379 F. Supp. at 767-72, which it is unnecessary to repeat.

It is well known that prior to the amendments there had been no increase in the rate of compensation to longshoremen by Congress since 1961. The employers-stevedores contended it was hard for them to pay any higher compensation because the compensation obligation had come to be not their only liability under Supreme Court precedents.

The Supreme Court held in *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946) that a longshoreman, like a seaman, could sue a shipowner for breach of warranty of unseaworthiness, without proof of negligence. This liability for unseaworthiness thus imposed was absolute and non-delegable. If the stevedore had caused the unseaworthiness, he was held to be liable for his breach of the warranty of workmanlike performance, and was liable to indemnify the shipowner, including Counsel fees even though the stevedore could not have been sued directly by his employee, the longshoreman, because of the latter's remedy against his employer was exclusively for compensation under the Act. *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Co.*, 350 U.S. 124 (1956) stressed the fact that "the Act prescribes no *quid pro quo* for a shipowner that is compelled to pay a judgment obtained against it for the full amount of a longshoreman's damages".

From the history of the 1972 Amendments, it is more than evident that it was a compromise between shipowners and stevedores with the interest of longshoremen and employees paramount. See *Lucas* v. *"Brinknes" Schiffahrts Ges.*, supra.

Excerpts from the House Report No. 1441 (Education and Labor Committee), U.S. Code Congressional and Administrative News, 92nd Cong., 2nd Sess. pp. 4698 et seq. (1972) tell the story of the legislative compromise. After stating the background,

> "Although employer groups indicated their willingness to increase worker benefits, they sought a modification of a long line of Supreme Court rulings. These decisions ruled that a shipowner was liable under the doctrine of seaworthiness, for damages caused by any injury regardless of fault. In addition, shipping com-

panies generally have succeeded in recovering the damages for which they are held liable to injured longshoremen from the stevedore's employer on theories of expressed or implied warranty, thereby transferring their liability to the actual employer of the longshoremen." (p. 4699),

the Committee referred to the *Sieracki* and *Ryan*, supra, doctrines, and stated that

> "the rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port." (p. 4703)

Consequently, the stevedore-employer by becoming indirectly liable to the longshoreman for greater damages than were recovered through a workmen's compensation claim. The potential rewards of this circular procedure made it increasingly popular and expensive.

This procedure drew increasing criticism, notably from Congress, which deplored the waste of judicial and financial resources involved. See H.R. Rep. No. 92-1441, 92nd Cong., 2nd Sess. 5 (1972); S. Rep. No. 92-1125, 92nd Cong., 2nd Sess. 9 (1972). The 1972 Amendments sought to eliminate that waste. They impose higher compensation payments upon the stevedore, and immunize him from indemnity actions by the vessel. The longshoreman enjoys greater compensation benefits, but sacrifices the leverage of the seaworthiness standard, which is replaced by negligence law.

The shipowner herein would like this Court to reinstate the indemnity problems which Congress sought to completely eliminate with the 1972 Amendments, this being its

primary consideration in undertaking the amendments. The petitioner claims that it cannot be held liable for the stevedore's negligence, if any. The stevedore, on the other hand, contends that the 1972 Amendments foreclose such an offset and argues, "under the amendments the vessel may not by contractual agreement or otherwise require the employer to indemnify it in whole or in part for such damages." Id. at 4704-05.

In reading all or part of 33 U.S.C. § 905(b), the Circuit Court rightfully interpreted it to mean to exclude liability by the employer to any extent, including the amount of the compensation payments. "If Congress had intended otherwise, it would simply have excluded employer liability for concurrent negligence 'except to the extent of its compensation payments.'" It is significant that no such exception was made.

The petitioner further argues that unless the stevedore be made to at least waive or forfeit its compensation lien whenever negligent, then there would be no incentive for safety on the part of the stevedore. This seems to be the chief thrust of its argument.

Nowhere is it pointed out to the Court that as a result of the 1972 Amendments which not only encompassed a greater number of employees, such as dock workers, but increased the compensation payments to injured longshoremen by approximately 530%. Pre-amendment, a longshoreman who lost a leg, would be awarded 288 weeks at $70.00 per week, a total of $20,160.00. As of 1974-1975, a longshoreman who averaged over $475.00 per week, and lost a leg, would be awarded 288 weeks at the maximum of $315.00 a week, a total of $90,720.00.

In a death case, where there is no ceiling, a widow and children are entitled to 66⅔% of the average weekly wage

of the deceased. Pre-amendment, at the rate of $70.00 per week, a widow and children received $3,640.00 a year. Post-amendment, a longshoreman who for the year prior to his death earned $30,000.00 a year (We have a number of such earners, particularly in Port Newark on containers.), his widow presently would receive $20,000.00 a year. Pre-amendment, a widow of such an earner, 35 years of age, with a life expectancy of 43 years, would receive $156,520.00. Post-amendment, at $20,000.00 a year, she would receive $860,000.00, a difference of $703,480.00.

Isn't this differential of the man with a leg off costing the stevedore an additional $70,560.00, and of a widow an additional expenditure of $703,480.00, of sufficient magnitude to create a strong incentive for promoting safety?

If not, then how could the stevedore's failure to recoup its compensation lien amount to incentive for safety as argued by the petitioner?

Petitioner further argues that the plaintiff may not recover against the shipowner unless he proves that the ship's negligence was solely responsible for this injury.

If this had been the intention of Congress in drafting Section 5(b), [33 U.S.C. 905(b)], Congress could easily have inserted the word "sole" so that it would have read "caused by the 'sole' negligence of the vessel". Was it the intent of Congress to give the ship so little incentive to avoid being negligent toward its longshoremen invitees?

There have been a number of decisions on the point at issue. *Cooper Stevedoring Co.* v. *Kopke, Inc.*, 417 U.S. 106 (1974); *Croshaw* v. *Koninklijke*, 398 F. Supp. 1224; *Dodge* v. *Mitsui*, 1975 A.M.C. 1505; *Hubbard* v. *Great Pacific Shipping Co., Monrovia*, Civ. 74-289 (D.C. Dist. of Oregon June 16, 1975); *Santino* v. *Liberian Distance Transports, Inc.*,

524-73C2 (W.D. Wash. at Seattle June 2, 1975); *Shellman* v. *U.S. Lines Operators, Inc.*, 1975 A.M.C. 362 (Cent. Dist. Cal. 1974), all in respondent's favor. There are no conflicts between the Circuits.

In essence, petitioner is seeking, contrary to the intent of Congress, judicial legislation amending and changing the 1972 Amendments, after considerable effort by Congress, shipowners, and stevedores, to avoid the circuitous, expensive litigation and thereby increasing the benefits to the injured longshoreman. The petitioner would have this Court legislate a theory of indemnity that once again would restore the waste of judicial and financial resources which Congress sought to and did eliminate.

CONCLUSION

For the foregoing reasons it is respectfully submitted that petition for writ of certiorari be denied.

Dated, Brooklyn, New York,
November 28, 1975.

Respectfully submitted,

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